



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Ms. Pamela Smith  
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Texas Department of Public Safety  
P. O. Box 4087  
Austin, Texas 78773-0001

OR2004-0938

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195772.

The Texas Department of Public Safety (the "department") received a request for the disciplinary records for nine specified department officers. You state that the department is prepared to release most of the requested information to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.022, 552.101, and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the submitted information.

You claim that some of the submitted information constitutes medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and

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<sup>1</sup> We note that although the department claims section 552.022 of the Government Code as an exception to disclosure, this section of chapter 552 of the Government Code does not constitute an exception to disclosure under the Public Information Act (the "Act"). Rather, section 552.022 specifies eighteen categories of information that must be released to the public, unless the information is expressly confidential under other law or, in the case of a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, excepted from disclosure under section 552.108 of the Government Code. See Gov't Code § 552.022(a). Accordingly, we do not address your claim that section 552.022 of the Government Code constitutes an applicable exception to disclosure.

privileged and may not be disclosed except as provided by this chapter." Occ. Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). We have marked the portions of the submitted information which are subject to the MPA. The department may only disclose this information in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the department must withhold this particular marked information pursuant to the MPA.

We note that the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The remaining submitted information either consists of or is contained in completed investigations made of, for, or by the department. Thus, the remaining submitted information must be released to the requestor pursuant to section 552.022(a)(1), unless it is expressly confidential under other law or is excepted from disclosure under section 552.108 of the Government Code.<sup>2</sup> Although the department claims that portions of the remaining submitted information are excepted from disclosure under section 552.107(1) of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Act that protects a governmental body's

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<sup>2</sup> We note that the department does not claim that any portion of the remaining submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code.

interests and may be waived.<sup>3</sup> Accordingly, we conclude that the department may not withhold any portion of the remaining submitted information under section 552.107(1) of the Government Code. We note, however, that the Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether any portion of the information that the department claims is excepted from disclosure under section 552.107(1) of the Government Code is confidential under rule 503 of the Texas Rules of Evidence. *See Open Records Decision No. 676 at 6 (2002)* ("appropriate law for a claim of attorney-client privilege for section 552.022 information is Texas Rule of Evidence 503"). Further, since the department claims that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code, we will address this claim as well.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

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<sup>3</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

TEX. R. EVID. 503. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information at issue is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You indicate that the portions of the remaining submitted information which are at issue consist of confidential communications exchanged between privileged parties for the purpose of facilitating the rendition of professional legal services in connection with particular completed investigations. Based on our review of your representations and the information at issue, we find that rule 503 is applicable to the entirety of this information. Accordingly, we conclude that the department may withhold the information that we have marked pursuant to rule 503 of the Texas Rules of Evidence.

You also claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.<sup>4</sup> Information is protected from disclosure under the common-law right to privacy when it is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The common-law right to privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are also protected from disclosure under the common-law right to privacy. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in

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<sup>4</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). Further, this office concluded in Open Records Decision No. 339 (1982) that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify the victim. *See* Open Records Decision No. 339 (1982); *see also Industrial Foundation*, 540 S.W.2d at 683-85; Open Records Decision Nos. 393 (1983), 339 (1982).

We also note that in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *See id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

You indicate that some of the remaining submitted information relates to an investigation or investigations of alleged sexual harassment. You, therefore, contend that this particular information is protected from disclosure on the basis of *Ellen*. We note, however, that *Ellen* involved an internal affairs investigation of a police officer's alleged sexual harassment of other employees. In this instance, the victims of any alleged sexual harassment are not department employees. Thus, the underlying facts in *Ellen* are distinguishable from the setting of the investigation or investigations at issue. Nevertheless, we find that the rationale of *Ellen* is applicable in this instance. Accordingly, we conclude that the information that we have marked within the remaining submitted information that would identify victims of any alleged sexual harassment is protected under the common-law right to privacy and, thus, must be withheld from disclosure pursuant to section 552.101. We have also marked portions of the remaining submitted information which identify victims of alleged sexual assault and are otherwise protected from disclosure under the common-law right to privacy. Therefore, the department must also withhold this particular marked information pursuant to section 552.101 of the Government Code.

We note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure a peace officer's home address, home telephone number, personal pager number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of

Criminal Procedure. *See* Crim. Proc. Code art. 2.12. Accordingly, we conclude that the department must withhold the information that we have marked pursuant to section 552.117(a)(2) of the Government Code.

In addition, we note that the department may be required to withhold some portions of the remaining submitted information pursuant to section 552.1175 of the Government Code. Section 552.1175 provides in pertinent part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(2) county jailers as defined by Section 1701.001, Occupations Code[.]

(3) current or former employees of the Texas Department of Criminal Justice ["TDCJ"] or of the predecessor in function of the department or any division of the department[.]

(4) commissioned security officers as defined by Section 1702.002, Occupations Code.

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a),(b). If the information that we have marked pursuant to section 552.1175 pertains to individuals who are among the types of individuals listed in section 552.1175(a) who elect to restrict access to this information in accordance with section 552.1175, then the department must withhold this particular marked information from disclosure. Otherwise, the department must release this particular marked information to the requestor.

Finally, we note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the department must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

In summary, absent the applicability of an MPA access provision, the department must withhold the information that we have marked pursuant to the MPA. The department may withhold the information that we have marked pursuant to rule 503 of the Texas Rules of Evidence. The department must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The department must also withhold the information that we have marked pursuant to sections 552.117(a)(2) and 552.130 of the Government Code. Further, if the information that we have marked pursuant to section 552.1175 of the Government Code pertains to individuals who are among the types of individuals listed in section 552.1175(a) who elect to restrict access to this information in accordance with section 552.1175, then the department must also withhold this information from disclosure. The department must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 195772

Enc. Marked documents

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